

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota State Employees Union
AFSCME, Council No. 5
AFL-CIO
South Saint Paul, Minnesota
Union

and

State of Minnesota
Department of Transportation
Employer/State

DECISION AND AWARD

Termination Grievance
Duane Poehls, Grievant
BMS Case No. 07-PA-0079

Award Dated: November 10, 2006

Date and Place of Hearing:

October 31, 2006
Offices of the Employer
Golden Valley, Minnesota

APPEARANCES

For the Union: Robert Hilliker, Senior Business Representative
American Federation of State, County and Municipal Employees
300 Hardman Avenue South
South Saint Paul, Minnesota 55075

For the Employer: Anthony Brown,
Minnesota Department of Employee Relations
200 Centennial Office Building
658 Cedar Street
St. Paul, Minnesota 55155

ISSUE

Did the Employer have just cause to discharge the Grievant, and if not what shall the remedy be?

WITNESSES TESTIFYING

Called by the Employer

Timothy Bangsund,
Electrical Maintenance Superintendent

Timothy Braatz,
Private Investigator

Judy Schmidt,
Administrative Supervisor – District 6

Amr Jabr,
Supervisor – Metro Area Traffic Engineering

Karen Bowman,
Metro Area Human Resources Director

Called by the Association

No witnesses were called

ALSO PRESENT

On Behalf of the Employer

Sue Brenner

Karin van Dyck

Gary Workman

On Behalf of the Union

Dean Frederickson

Duane Poehls, Grievant

Greg Pullis

Barbara Sasik

JURISDICTION

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 17 of the Collective Bargaining Agreement between the parties (Joint Exhibit 1) and under the rules of Bureau of Mediation Services of the State of Minnesota. The case was submitted to the Arbitrator for a decision under the

regular, non-expedited arbitration procedures specified in Article 17 of the labor agreement.

The Arbitrator was selected by the parties from a list of names of arbitrators supplied to them by the Bureau of Mediation Services. The parties stipulated at the hearing that the Arbitrator had been properly called. The parties also mutually stipulated at the hearing that the grievance had been properly processed through the required steps of the grievance procedure without resolution, and that it was properly before the Arbitrator for a decision.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Each party submitted a notebook containing exhibits in support of their positions. Those notebooks were entered into the record of the hearing without objection. Final argument was provided orally at the hearing. The record in this case was closed with the close of the hearing. The issue is now ready for determination.

STATEMENT OF THE ISSUE

The issue in this case is: whether or not the Employer had just cause to discharge the Grievant, and if not what is the remedy? The sections of the Collective Bargaining Agreement that bear directly on this issue are contained in Article 16 – DISCIPLINE and DISCHARGE, and Article 17 – GRIEVANCE PROCEDURE. They read in relevant part as follows:

ARTICLE 16 – DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause.

Section 3. Disciplinary Procedure. Disciplinary action or measures shall include only the following:

1. Oral reprimand;
2. Written reprimand;
3. Suspension;
4. Demotion; and
5. Discharge.

Section 5. Discharge. The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharged and shall be furnished with the reason(s) therefore and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting upon request. The right to such meeting shall expire at the end of the next scheduled work day of the employee after the notice of discharge is delivered to the employee unless the employee and Appointing Authority agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee was not in pay status at the time of the notice of discharge, for reasons other than an investigatory leave, the requirement to be on pay status shall not apply.

ARTICLE 17 – GRIEVANCE PROCEDURE

Section 5. Arbitrator's Authority. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of this Agreement, and shall have no authority to make a decision on any other matter not so submitted to him/her. The Arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this Agreement and the facts of the grievance presented.

FACTUAL BACKGROUND

Involved herein is a grievance that arose when the Grievant was discharged effective April 4, 2006. The reasons cited by the Employer for the Grievant's discharge are the following:

1. Exhibited numerous and excessive periods of unproductive work time including:
 - a. Spending several hours sitting in your Mn/DOT vehicle doing nothing while being in "paid status".
 - b. Shopping while being in "paid status"
 - c. Conducting personal business while being in "paid status"
 - d. Taking lunch and break periods that are excessively longer than allowed by Mn/DOT contract.
2. You used a Mn/DOT cell phone to make personal phone calls that violated Mn/DOT policies by their excessive number and duration.
3. You used a Mn/DOT computer for personal reasons (send and/or receive non-work related e-mails and browse the internet) that violated Mn/DOT's policies its excessive frequency and duration.
4. You violated Mn/DOT policies regarding wearing safety apparel while conducting field activities.

The Employer is the State of Minnesota. The Union is the exclusive bargaining representative of all employees working in the units described in Appendix A of the labor contract (Joint Exhibit 1). At all times relevant to this grievance the Grievant was a member of the Union and covered by the Collective Bargaining Agreement. The

Collective Bargaining Agreement became effective on July 1, 2005 and continues in full force and effect through June 30, 2007.

The Grievant has 16 years of continuous employment with the Minnesota Department of Transportation where he worked as a Highway Signal Technician in the Metro Electrical Services Section. Prior to September 30, 2005 the Grievant had been working a flextime work schedule whereby he worked from 6:00 AM to 3:00 PM Monday through Thursday and from 6:00 AM to 12 Noon on Friday. On September 30, 2005 the Employer notified the Grievant that his flextime work schedule, and that of other employees, was to be discontinued effective October 28, 2005, and he was to “resume a normal work schedule of 5 work days, each day being 8 hours long”. His normal workday was changed to begin at 7:00 AM and end at 3:30 PM. The Employer cited reasons of efficiency for implementing the change. Upon receiving notice that his work hours were being changed the Grievant wrote a letter to Commissioner of Transportation Carol Molnau on October 3, 2005. In his letter the Grievant expressed three concerns: 1) the change in his work hours, 2) the requirement that the Highway Signal Technicians refrain from parking their work trucks at truck stations in or near their work area, and 3) replacement of the cell phones provided the Highway Signal Technicians by the State with cell phones that could be tracked with a GPS monitor. The Grievant complained that the change in work hours would result in considerable inconvenience and additional costs to his family.

The Grievant’s letter to Commissioner Molnau was forwarded to Gary Workman, P.E., the Director of the Office of Traffic and Maintenance Operations for a reply. Mr.

Workman replied on October 25, 2005. In his response letter Mr. Workman described the reasons why the State took the actions it did. He described in some considerable length the rationale behind changing the Grievant's work hours to a regular Monday through Friday 7:00 AM to 3:30 PM shift.

In 2002 Mr. Tom Bangsund was appointed as Electrical Maintenance Superintendent overseeing the Electrical Services Section after it was moved to the Metro District Office. Mr. Bangsund was directed by his supervisor, Amr Jabr, to review the productivity of the unit and develop means of improving efficiency. He implemented certain departmental policies and took other actions that were aimed at improving productivity. Among the actions taken by Mr. Bangsund were changes in the Mn/DOT vehicle take home policy, the ordering of GPS tracking cell phone, and the discontinuance of flextime schedules. After implementing these Section wide changes, Mr. Bangsund turned to evaluating the productivity of individual employees.

In the course of his evaluations of individual employees Mr. Bangsund noted relatively low productivity by the Grievant. He found "inconsistencies" in the Grievant's performance as shown by low parts usage, indicating that the Grievant had not affected many repairs to the systems he was maintaining. He also found that the Grievant had excessive cell phone usage.

In April 2005 the Employer provided all Highway Signal Technicians with a new type of cell phone. Those cell phones had the ability to track the location of user by GPS

satellites. Mr. Bangsund found that the cell phones were able to track the locations of all the Highway Signal Technicians except for the Grievant. The Grievant's cell phone worked properly, giving a correct location when the Grievant was using it, but when not in use no location information was received, as it should have been. Further investigation led Mr. Bangsund to believe that the GPS satellite signal was being intentionally blocked. In order to ascertain what was happening, Mr. Bangsund drove to a location on Interstate Highway 35 where the Grievant was thought to be working. Upon arrive at the scene he found the Grievant in his truck reading a newspaper.

Subsequently, Mr. Bangsund drove to a location where he suspected the Grievant was picking his child up from school during his "paid status" work time. There he witnessed the Grievant pickup his younger son from school in his State assigned vehicle. Another boy, thought to be the Grievant's older son, was seen in the vehicle at that time as well. A second observation was subsequently taken by a representative from the Department of Human Resources. That observation also showed the Grievant picking up his son with a State vehicle on paid time.

On the strength of these two observations, the State hired Timothy Braatz, a Private Investigator, to conduct surveillance of the Grievant during his working hours. Mr. Braatz's report was entered at Tab 6 of the Employer's exhibits. Mr. Braatz supplemented his written report with videotape that was also submitted as an exhibit. The report showed non-productive time by the Grievant, including personal shopping, extended break periods, and again picking up his son from the Great River Middle School

in the State supplied vehicle. During some of the surveillance the Grievant was seen exiting his vehicle not wearing his complete safety apparel consisting of a reflective vest and safety hat.

Upon receiving the report from Mr. Braatz the State initiated an internal investigation that was headed by Judy Schmidt, an Administrative Supervisor in District 6. Ms. Schmidt is not in the same organizational unit as the Grievant. Ms. Schmidt's investigation examined, among other things, the Grievant's use of his State issued cell phone and computer. That investigation showed the Grievant made considerable personal use of his State issued cell phone, and that he spent a considerable amount of time surfing the internet and sending personal e-mails using the State supplied computer.

In the course of Ms. Schmidt's investigation the Grievant was interviewed, with Union representation present, and afforded an opportunity to give his side of the story. Subsequently, the Grievant provided Ms. Schmidt with a written response to the investigation interview. In that response the Grievant averred that the investigation constituted "harassment and was a part of an on-going plan by the current supervisors at the Electrical Services Department at MNDOT to exert their will over the employees under their supervision". Mr. Poehls went on to state in his response that the standard for excessive use of his cell phone for personal calls was not clear. He further stated that he had been using the State issued computer to access the Internet for many years, and was not cautioned against such use until this investigation. He opined "if this was an issue I think someone should have mentioned this sometime in the last 8-10 years we have had

computers to access the Internet”. Mr. Poehls went on to express confusion as to how the investigation and his performance evaluations related. He stated: “How can someone receive an excellent review indicating good work habits and performance and then be subject of an investigation alleging insubordinate behavior within weeks?” Ms. Schmidt testified that she had no role in determining the level of discipline issued to the Grievant.

Upon receiving the investigative report, Amr Jabr, the Supervisor of Metro Area Traffic Engineering reviewed the charges against the Grievant and asked the Grievant to explain. He found his explanations lacking. Mr. Jabr then consulted with Gary Workman, Director, Office of Traffic Maintenance Operations, and with Ms. Karen Bowman, the Metro Area Human Resources Director. They determined that a thorough investigation had been conducted and that the position of Highway Signal Technician required a high level of trust due to the fact those technicians work independently in the field. They further determined that the Grievant had violated that trust, and that discharge was the appropriate penalty.

The Grievant was discharged on April 4, 2006. His discharge was promptly grieved by the Union. The Grievance was heard in arbitration on October 31, 2006.

POSITION OF THE PARTIES

Position of the Employer

The State claims that it had just cause to discharge the Grievant. It seeks an order that the Arbitrator upholds the discharge and denies the grievance. In support of this position the State offers the following arguments:

1. The State acknowledges that it is burdened to show that it had just cause to discharge the Grievant, and argues that it has shouldered that burden using any reasonable standard of just cause.
2. The State has shown with sufficient evidence that the Grievant knowingly violated policies of which he was aware.
3. The charges against the Grievant are not contested by the Union or the Grievant.
4. The State conducted thorough investigations using the services of a private investigator and an internal investigator. Those investigations clearly showed that the Grievant willfully violated cell phone and computer policies, used a State provided vehicle for personal purposes, conducted personal business while on "paid status", and failed to wear required safety apparel.
5. Any one of these violations may not justify discharge, but there is more involved here. The total of all the violations justifies the sanction of discharge.

Position of the Union

It is the position of the Union that the State did not have just cause to discharge the Grievant, and that he should be reinstated, with whatever discipline the Arbitrator finds appropriate to his former position. In support of this position, the Union offers the following arguments:

1. The State did not have just cause for discharge. While some sanction may be appropriate, discharge is simply too severe a penalty under the facts of this case.

2. The State did not give the Grievant opportunity to correct his behavior. They knew about his conduct in November of 2005, but did not counsel him or discipline him at that time. Had they done so, the Grievant would have corrected his behavior and the matter would not have arisen.
3. The Grievant is a 16-year employee with a good performance record. He should be given consideration for this long incident free performance to the State.
4. As shown in a prior expedited arbitration award, an Arbitrator may apply a lesser penalty when it is shown that the action of the Employer is too severe.
5. The Grievant has expressed remorse, and would continue to give good service to the State upon being returned to work.
6. The State has a substantial investment in the Grievant's training and development. He will continue to provide the State with a return on that investment by being returned to work.

ANALYSIS OF THE EVIDENCE

The matter in dispute is whether or not the discharge of the Grievant is supported by just cause, given all the facts in evidence. The controlling contract language is found in Article 16, which specifies that disciplinary action may be imposed only for "just cause". The labor contract (Joint Exhibit 1) does not define the term "just cause", however. Accordingly, the usual and ordinary definition of that phrase must be used. Such a definition is found in the standards for just cause described in the landmark reference: Just Cause, the Seven Tests, by Koven and Smith, 2nd Ed., 1992, BNA. These seven tests are attributed to the distinguished arbitrator Carroll R. Daugherty, and described in Enterprise Wire Co. (46LA 363, 1966). They are 1) reasonable rules and orders, 2) notice, 3) investigation, 4) fairness of the investigation, 5) proof, 6) equal treatment, and 7) fairness of the penalty.

Careful analysis of the evidence adduced at the hearing compels a determination that the rules and policies that formed the basis of the Grievant's discharge are reasonable and related to the efficient operation of the Department. It is also clear from the evidence that the policies related to appropriate use of electronic communication and technology were known to the Grievant. Indeed, he signed an acknowledgement in June 2004 that he had received and understood those policies. The Union did not challenge the reasonableness of the policies and rules under which the Grievant was discharged. Accordingly, the rules must be regarded as reasonable and the Grievant had notice of them.

The evidence shows that the State conducted a comprehensive and thorough investigation before issuing the discharge notice to the Grievant. A private investigator was utilized, and a thorough internal investigation was conducted. The findings of those investigations were not challenged. The decision to discharge the Grievant was reached only after review of the investigative findings by higher levels of management within the Metro Region. All relevant persons were interviewed, and the Grievant had adequate opportunity to tell his side of the story with his Union representatives present. It is hard to imagine what more the State could have done to ensure a complete and fair investigation. The record compels a finding that the investigation conducted was thorough and fair.

As to proof that the Grievant is guilty of the charges against him, the Union did not contest that errors were made. Indeed there was no evidence presented that cast any

doubt whatsoever, regarding any of the charges of alleged misuse of cell phones, computers, State vehicles, or the Grievant's paid time. The evidence is clear and convincing that the Grievant is guilty of the charges against him.

The Union argues that the Grievant was singled out for disparate treatment. They point to the fact that the Grievant's immediate Supervisor, Kevin Millage, was not discharged when he was found to have picked up his wife in a State provided vehicle on a previous occasion. The evidence does not support such a defense, however. The Millage case was clearly distinguishable from the instant case. In the Millage case management had given him permission to pick up his wife at her initial work location. When she changed work locations an additional nine miles was added to the distance Mr. Millage would have to drive the State vehicle to pick her up. He did not seek permission for the extra distance involved until approximately five months had elapsed. Mr. Millage was given a written reprimand and compensated the State for the additional mileage involved. In the instant case the Grievant is charged with four violations involving misuse of a State provided cell phone, misuse of a State provided computer, misuse of a State provided vehicle, and misuse of his own time. Clearly the violations in the instant case are more egregious than those involved in the Millage case.

That brings analysis of the evidence to the point where the fairness of the penalty imposed is to be examined. The fairness of the sanction applied in this case needs to consider, among other things, the seriousness of the misconduct of the Grievant, any prior disciplinary actions taken against him, and his overall record. Clearly, the misconduct of

the Grievant is very serious. The fairness of the penalty is determined by considering the evidence from the standpoint of a reasonable impartial person. It was not challenged that the Grievant worked in the field away from any direct supervision most of the time. As such, the employment relationship is highly dependent on trust. The State must trust the Grievant to be diligent in the performance of his duties, and the Grievant must trust that the State will provide adequate compensation, training, tools, and equipment to do his job. A reasonable person would expect that a Highway Signal Technician would not spend a substantial portion of his day on personal cell phone calls, surfing the internet for personal reasons, sending personal e-mails, conducting personal business while on State time, and using a State provided vehicle for personal purposes without permission. The Grievant's violations of the safety apparel policy would, by themselves, not likely rise to the level of a dischargeable offense in the mind of reasonable people. It must be noted, however, that he was not discharged for that alone. The basis of his discharge was the cumulative effect of all of those violations. A reasonable person would regard the totality of those violations sufficient to justify discharge absent significant mitigating factors.

In searching the record for mitigating factors, it is noted that the Grievant had received generally good performance evaluations prior to his discharge. That finding is compelling, but not controlling. The Grievant was not discharged for low performance. He was discharged for misuse of his time and State assets provided him for performing his job. Such misuse is a misconduct issue, not to be confused with low performance. A reasonable person would make that distinction. Understandably, the Union challenges why the Grievant was discharged after receiving satisfactory performance evaluations.

The record shows, however, that the Employer's investigation was on-going at the time of the Grievant's performance evaluation. Indeed, the Grievant's performance appraisal was performed on February 14, 2006, whereas the State's investigation was not completed until late March 2006.

The Union also argues that the discharge of the Grievant must be set aside because the State knew of his misconduct well before he was discharged, and did not provide him an opportunity to correct his conduct. That argument is not convincing. The record shows that the Grievant had been previously issued a written reprimand for misuse of a State provided cell phone in April of 2003. That reprimand clearly should have forewarned the Grievant that the State was concerned about his personal use of a State issued cell phone. That was the opportunity for him to correct his behavior. Regrettably, he did not heed that warning. Additionally, the record shows that the Grievant had been briefed in Departmental meetings about relevant policies and the Code of Ethics of the State. A reasonable person would find those briefings should have provided the Grievant with sufficient guidance in the use of State issued equipment. While the Grievant's record is not seriously flawed with prior discipline, it must be noted that the charges against him are serious, and his conduct falls well short of what a reasonable person would expect of a State employee. Overall the Grievant's record does not rise to a level that would mitigate the seriousness of the offenses, and compel a lesser penalty than discharge.

It is important to note that the Grievant's conduct was not a one-time momentary lapse in good judgment. The record shows a continuing pattern of misuse of his time and the

assets provided to him by the State. A reasonable person would conclude that such a continuing pattern of misuse is serious, and demonstrates an on-going disregard for the Employer's legitimate interests.

Arbitrators do not lightly overturn the decisions of management in disciplinary cases. They will not hesitate to do so, however, if the record of the hearing shows that the employer acted in a capricious or arbitrary manner. The record of the instant case presents no such showing. Accordingly, the Arbitrator is without authority for imposing a lesser penalty. For all of the above cited reasons the record compels a finding that the Employer had just cause to terminate the Grievant. The grievance must be denied.

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AWARD

Based on the evidence and testimony entered at the hearing, the termination of Grievant Duane Poehls is found to be for just cause. The grievance and all remedies requested are denied.

Dated: _____

James L. Reynolds
Arbitrator